

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JEFFREY S. NORMAN,

Plaintiff,

vs.

DEPARTMENT OF CORRECTIONS,
ELDON VAIL, MAGGIE MILLER
STOUT, CAPTAIN JOHN DOE #1,
SERGEANT KENNEDY, C/O
NAYLOR, SERGEANT JOHN DOE
#3, C/O CZINGLINNI, CAPTAIN
JOHN DOE #2, SERGEANT
JACKSON, C/O BALDASSARRE,
HCM1 RUSTY SMITH, and
LINDA MARTIN,

Defendants.

NO. CV-09-234-EFS

ORDER DISMISSING ACTION FOR
FAILURE TO EXHAUST

Plaintiff, a prisoner at the Airway Heights Correction Center, brings this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983. In light of the following disposition of this action, **IT IS ORDERED** Plaintiff's application to proceed *in forma pauperis* is **DENIED**.

The Prison Litigation Reform Act requires that a prisoner exhaust available administrative remedies before bringing a federal action concerning prison conditions. 42 U.S.C. § 1997e(a) (2008); *see Porter v. Nussle*, 534 U.S. 516, 524, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)

1 ("Even when the prisoner seeks relief not available in grievance
2 proceedings, notably money damages, exhaustion is a prerequisite to
3 suit."). Exhaustion must be "proper." *Woodford v. Ngo*, 548 U.S. 81,
4 93, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006). This means that a
5 grievant must use all steps the prison holds out, enabling the prison
6 to reach the merits of the issue. *Id.* at 90, 126 S.Ct. 2378.

7 Exhaustion must precede the filing of the complaint and
8 compliance with the statute is not achieved by satisfying the
9 exhaustion requirement during the course of an action. *McKinney v.*
10 *Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002). Here, Mr. Norman admits
11 on the complaint form and in the body of his complaint that he has not
12 completely exhausted available administrative procedures. Therefore,
13 the court is obligated to dismiss the complaint for failure to exhaust
14 administrative remedies, *see Griffin v. Arpaio*, 557 F.3d 1117, 1119
15 (9th Cir. 2009) (noting 42 U.S.C. § 1997e(a) requires prisoners to
16 exhaust administrative remedies before bringing § 1983 action).
17 Accordingly, **IT IS ORDERED** this action is **DISMISSED without prejudice**.

18 Plaintiff is free to file a new and separate action once he has
19 completely exhausted available remedies within the prison. He should
20 be aware section 1983 requires a claimant to prove (1) a person acting
21 under color of state law (2) committed an act that deprived the
22 claimant of some right, privilege, or immunity protected by the
23 Constitution or laws of the United States. *Leer v. Murphy*, 844 F.2d
24 628, 632-33 (9th Cir. 1988). A person deprives another "of a
25 constitutional right, within the meaning of section 1983, if he does
26 an affirmative act, participates in another's affirmative acts, or
27

1 omits to perform an act which he is legally required to do that
2 "causes" the deprivation of which [the plaintiff complains]." *Redman*
3 *v. County of San Diego*, 942 F.2d 1435, 1439 (9th Cir. 1991) (brackets
4 in the original), cert. denied, 502 U.S. 1074 (1992); *Johnson v.*
5 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

6 A complaint must set forth the specific facts upon which the
7 plaintiff relies in claiming the liability of each defendant. *Ivey v.*
8 *Board of Regents*, 673 F.2d 266, 268 (9th Cir. 1982). Even a liberal
9 interpretation of a civil rights complaint may not supply essential
10 elements of a claim that the plaintiff failed to plead. *Id.* at 268.
11 To establish liability pursuant to § 1983, Plaintiff must set forth
12 facts demonstrating how each Defendant caused or personally
13 participated in causing a deprivation of Plaintiff's protected rights.
14 *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981); *Taylor v. List*,
15 880 F.2d 1040, 1045 (9th Cir. 1989). Plaintiff must present a causal
16 connection between each named defendants and the conduct of which he
17 complains. See *Hamilton v. Endell*, 981 F.2d 1062, 1067 (9th Cir.
18 1992). Therefore, Plaintiff's listing of spouses of identified
19 Defendants is insufficient in the context of a § 1983 action.

20 Furthermore, "neither a State nor its officials acting in their
21 official capacity are 'persons' under § 1983." *Will v. Michigan Dept.*
22 *of State Police*, 491 U.S. 58, 71 (1989). Likewise, "arms of the
23 State" such as the Department of Corrections are not "persons"
24 amenable to suit under 42 U.S.C. § 1983. *Id.*, at 70. Accordingly,
25 claims against the Department of Corrections would be subject to
26 dismissal.

1 In addition, a supervisor is only liable for the constitutional
2 violations of his or her subordinates if the supervisor participated
3 in or directed the violations, or knew of the violations and with
4 deliberate indifference, failed to act to prevent them. *Wilson v.*
5 *Seiter*, 501 U.S. 294, 303-304 (1991). There is no respondeat superior
6 liability under 42 U.S.C. § 1983. *Taylor, supra* at 1045. A
7 supervisory Defendant must be aware of constitutional violations or
8 that alleged constitutional violations were caused by a custom or
9 policy they established.

10 **IT IS SO ORDERED.** The District Court Executive is directed to
11 enter this Order, enter judgment, forward a copy to Plaintiff and
12 close the file. The court finds any appeal would not be taken in good
13 faith.

14 **DATED** this 24th day of September 2009.

15
16 s/Edward F. Shea
17 EDWARD F. SHEA
18 United States District Judge
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